Supreme Court, U.S.
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No. 99-216

IN THE

Supreme Court of the United States

CHARLES AMATI, *et al.*,

Petitioners,

v.

CITY OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners contended in the trial court that respondents, the City of Woodstock ("Woodstock"), its police chief, administrative sergeant, and communications supervisor, violated § 2511(1)(a) of the Federal Wiretap Act (the "Wiretap Act") by taping (815) 338-7799, a telephone line in the Woodstock Police Department.[1] (Section 2511(1)(a) of the Act prohibits the intentional interception of a wire communication.) Petitioners argued to the jury that the taping was done secretly so that respondents could obtain private information about petitioners from their personal calls, in order to gain an advantage in on-going union collective bargaining negotiations, to discover infractions of department rules, and to monitor criticism by petitioners of the department administration. Respondents denied petitioners' contentions. Respondents maintained that the 7799 line was routinely taped, like 911 and other police lines in the department, for legitimate police purposes. Respondents maintained that the taping of the line fell within 18 U.S.C. § 2510(5)(a), which excepts from the prohibitions of the Wiretap Act the taping of a telephone line by a "law enforcement officer in the ordinary course of his duties. . . ." 18 U.S.C. § 2510(5)(a). Prior to trial, the Wiretap Act claims were dismissed against Woodstock.

Prior to the case going to the jury, petitioners moved for judgment as a matter of law, which was denied by the trial court based on a conflict in the evidence. The jury was then

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1. Petitioners also alleged that the taping violated the Fourth Amendment and sought recovery for it under 42 U.S.C. § 1983. Those claims were also determined in favor of respondents by the jury. Petitioners did not appeal and those claims are not at issue here.

instructed that the taping had to be done "secretly" in order to violate the Wiretap Act. The jury was also given a special interrogatory asking whether it found that the taping was done secretly. After deliberation, the jury returned a verdict in favor of respondents, and answered the special interrogatory that the taping was not secret.

Petitioners then appealed to the Seventh Circuit arguing, inter alia, that the trial court should have granted their motion for a judgment as a matter of law, that the jury was improperly instructed, and that the district court erred in dismissing the Wiretap Act claim against Woodstock. The Seventh Circuit found that based on the conflict in the evidence presented at the trial, petitioners were not entitled to judgment as a matter of law. The Seventh Circuit also found that petitioners waived any objection to the jury instructions. The Seventh Circuit further observed in its opinion that the dismissal of Woodstock was proper because municipalities are not subject to § 2511(1) of the Wiretap Act.

The petition distorts the evidentiary record. The facts that the jury credited and which support the jury's verdict and the Seventh Circuit's affirmance are ignored.

A. The Petition Misrepresents The Nature Of The 7799 Line.

The petition describes 7799 as though it were a telephone line dedicated for petitioners' personal use. In actuality, 7799 was a police business line which had been taped in the department communication center since shortly after it was installed in 1978. Since its inception the 7799 line had been used to respond to bank alarms, and to communicate with police officers, rescue squad personnel and other law

enforcement agencies regarding police business. Taping of the line was expanded to all locations within the police station in February, 1992, chiefly as a response to the mishandling by a police dispatcher of a call regarding a chlorine gas leak at a public swimming pool. The investigation into how the call was handled was thwarted because several of the crucial calls regarding the incident were on 7799 at untaped locations.

The line was unpublished, but that too was for police business purposes. Petitioners' contention that 7799 was dedicated for their personal use was refuted by transcripts of recordings of calls on that line regarding a request for a rescue squad for a choking victim at a nearby courthouse, several reports of threats of domestic violence, calls regarding a drug overdose by a 15-year old boy, a report of a person having a heart attack, several calls about automobile accidents and disabled vehicles, a call to complain about discourteous service by a dispatcher, and many other emergency and non-emergency police service calls. The 7799 line was taped for the same reason that six other telephone lines in the department were taped — to have a record of calls relating to police business.

B. The Petition Misrepresents That Respondents Mislead Petitioners About The Nature Of 7799

Petitioners misrepresent that they were mislead into believing that the 7799 line was an untaped line for personal telephone calls. Petitioners dug up an out-dated memorandum circulated in the department in 1982, ten years before the expanded taping, which they argued established a policy that 7799 was untaped for personal calls. However, the memorandum never expressed an official policy of

Woodstock. On the contrary, it was circulated without authority by one of the petitioners who served temporarily as a technical assistant in the communications department. It was neither issued nor approved by the police chief. By 1992, when the taping of 7799 was expanded, the old memorandum was long forgotten, and only a handful of petitioners had ever seen it. The argument that this obsolete memorandum mislead petitioners about the nature of 7799 was, given the jury's verdict, completely discredited.

The same is true of the other memoranda which petitioners claim mislead them into believing 7799 to be an untaped line for personal calls. The petition states that a 1985 telecommunications manual designated 7799 as an untaped line, but fails to mention that in 1991, that manual was superceded by a new one that deleted any reference to 7799 as an untaped line. A 1986 memorandum that petitioners' relied on actually warned that 7799 was subject to being taped at all locations, and evidence was presented to show that another memorandum petitioners offered to show that 7799 was an untaped line for personal calls was actually fabricated.

The petition also misrepresents that petitioners were encouraged to make personal telephone calls on 7799. The evidence showed that personal calls were prohibited on 7799, and on all other police lines. Although the prohibition was widely disregarded, respondents made many efforts to prevent personal use of the 7799 lines in the department.

C. The Petition Misrepresents The Extent Of Petitioners' Knowledge Of The Expanded Taping.

The petition misrepresents that petitioners had no notice of the 1992 expansion of the taping of the 7799 line. The

evidence showed that several petitioners had actual knowledge of the taping, but feigned a lack of knowledge to share in a potential windfall they hoped to recover from the lawsuit. In addition, the evidence showed that all petitioners should have known of the expanded taping, from the equipment used to tape the line, from the prior history of the taping of the line, from discussions about the expanded taping in the department, and because it was a police line which, like other police lines in the department, was subject to being routinely taped. The jury clearly found respondents' evidence credible and rendered their verdict accordingly.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED ON THE QUESTION OF THE SEVENTH CIRCUIT'S APPLICATION OF THE ORDINARY COURSE EXCEPTION, BECAUSE THE PETITION IGNORES THE PROCEDURAL POSTURE IN WHICH THE CASE CAME TO THE COURT OF APPEALS, AND BECAUSE THE SEVENTH CIRCUIT PROPERLY INTERPRETED THE ORDINARY COURSE EXCEPTION.

A. Plaintiffs' Ignore The Procedural Posture of The Case Before The Court Of Appeals

The petition reads like a law school term paper on a legal issue disembodied from a real life trial setting. In reality, the case was appealed to the Seventh Circuit from a jury verdict finding no violation of the Wiretap Act, a verdict returned after three weeks of hotly contested evidence. Petitioners now argue that the Seventh Circuit should have reversed the jury's verdict and ordered judgment in

petitioners' favor as a matter of law, and the petition reads as though there were no side to this case but theirs.

Respondents introduced evidence to show that 7799 was always a police line, and that efforts were made over the years to prevent personal calls on the line. They showed that the line had always been taped in the communications center, that the taping was prominently posted in that part of the police station, and that when the taping of the line was expanded in 1992, it was done openly and was easily discoverable.

Respondents introduced evidence to show that petitioners were in fact misleading the jury by distorting the intent and meaning of the various memoranda issued by the department, and that petitioners' may have even fabricated one memorandum. Respondents proved that the expanded taping of 7799 was done in 1992 only because of the administrative need for the line to be taped, which became apparent when an investigation into whether a police dispatcher had mishandled a call was rendered inconclusive because crucial calls were made on 7799 at an untaped location. Respondents submitted evidence that the taping was done only for police purposes.

Faced with divergent evidence, the district court properly denied petitioners' motion for judgment as a matter of law. The case was submitted to the jury, which was instructed that one of the elements petitioners' must prove in order to prevail was that the taping was done "secretly." Petitioners made no objection to this instruction. In fact, petitioners included this same element in their own set of proposed instructions. After deliberation, the jury returned a verdict in favor of respondents, answering a special interrogatory that the taping was not done secretly.

Petitioners' argument on appeal was that they were entitled to judgment as a matter of law. However, the evidence presented in the trial court was so conflicting that there was no way in which the Seventh Circuit could have agreed that petitioners were entitled to judgment as a matter of law. The argument petitioners now make in their petition, regarding the proper meaning of the "ordinary course" exception, might have been appropriate to an argument in the Court of Appeals on the propriety of the jury instructions. However, petitioners could not complain about the instructions because they failed to object to them in the district court. The Seventh Circuit, finding that petitioners were properly denied judgment as a matter of law, and that any objection to the instructions was waived, affirmed the judgment.

The argument presented in the petition regarding the proper elements of the ordinary course exception under the Wiretap Act is disconnected from the results below. The Seventh Circuit's interpretation of the "ordinary course" exception was correct, but even if not correct, petitioners' real bone of contention is with how the jury was instructed, not with the Seventh Circuit's interpretation of the ordinary course exception. Because petitioners included the same "secretly" language in their instructions and did not object to this language, the jury instruction issue was waived. The argument contained in the petition, representing petitioners' view of the "ordinary course" exception, can have no impact on the outcome of the case. As a result, the Writ should be denied.

B. The Writ Should Be Denied Because The Seventh Circuit's Interpretation of The "Ordinary Course" Exception Was Correct, And Is Consistent, Rather Than In Conflict, With The View Of Other Circuits

Petitioners disagree with the Seventh Circuit's interpretation of the "ordinary course" exception to the Wiretap Act's prohibitions. They argue that the exception does not apply unless a caller on a taped line in a police station is first given express notice that the line is taped. The Seventh Circuit, however, was correct. The determinative factor is that the taping be "ordinary," not that it be preceded by express notice. The Seventh Circuit's opinion is consistent with the statute's language, with the purpose of the ordinary course provision of the Wiretap Act, and with the majority of the precedent. As a result, the Writ should be denied.

Petitioners alleged in the district court that the taping of 7799 violated § 2511(1) of the Wiretap Act, which prohibits the intentional "interception" of a telephone communication. A threshold for § 2511 to apply is that the communication be "intercepted," and the taping of a telephone call is not an interception when done by "a law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a)(ii).

The statute contains no express notice requirement for the exception to apply. As the Seventh Circuit observed, if the ordinary course exception required actual notice, it would overlap other provisions of the statute which remove from the statute's prohibition those calls taped with a caller's consent. *See* 18 U.S.C. § 2511(2)(c). If a caller has actual notice of the taping of a line, and speaks on that line anyway, how could it be argued that the caller did not a least impliedly consent to the taping?

The language of the ordinary course exception does not require express notice, it only requires that the taping be "ordinary." The Seventh Circuit convincingly explained what "ordinary" means under the exception:

> Investigation is within the ordinary course of law enforcement, so if "ordinary" were read literally warrants would rarely if ever be required for electronic eavesdropping, which was surely not Congress's intent. Since the purpose of the statute was primarily to regulate the use of wiretapping and other electronic surveillance for investigatory purposes, "ordinary" should not be read so broadly; it is more reasonably interpreted to refer to routine noninvestigative recording of telephone conversations. . . . Such recording will rarely be very invasive of privacy, and for a reason that does after all bring the ordinary- course exclusion rather close to the consent exclusion: what is ordinary is apt to be known; it imports implicit notice. To record all calls to and from a police department is, for the reasons explained earlier, a routine police practice. If "ordinary course" of law enforcement includes anything, it includes that.

(App. 5a-6a).

The Seventh Circuit's interpretation of the ordinary course exception was correct. It is the routine, administrative nature of the taping, which is distinct from an investigative surveillance targeted at a particular subject, that is the hallmark of the ordinary course exception, not express notice. This is consistent with prior Seventh Circuit decisions (*see e.g.*, *United States v. Feekes*, 879 F.2d 1562 (7th Cir.

1989); *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990)), and consistent with the decisions of other courts confronted by the issue (*United States v. Cheely*, 814 F. Supp. 1430, 1442 (Dist. Alaska 1992), *aff.*, 36 F.3d 1439 (9th Cir. 1994) ("On close examination it is clear that it is the routine nature of the monitoring and recording that is crucial, and not the nature of the notice. Notice tends to confirm that the monitoring is routine. The adequacy of the notice only becomes a central concern when the issue is whether there is implied consent under § 2511(2)(c)."); *United States v. Green*, 842 F. Supp. 68, 73 (W.D. N.Y. 1994) ("In this case, however, the special attention paid to Donald Green's calls appear not at all routine or ordinary.")

Of course, what is ordinary will depend on the circumstances, and a court could conceivably find, depending on the context, that notice is required for the taping to be "ordinary." For example, where prison regulations require notice before telephone calls could be taped, "ordinary" could require notice, and lack of notice could make the taping "unordinary." *See United States v. Sababu*, 89 F.2d 1308 (7th Cir. 1989); *Crooker v. United States Dept. of Justice*, 497 F. Supp. 500 (D. Conn. 1980). That is precisely what was behind the so-called "majority analysis" discussed in the petition. However, a per se express notice requirement for application of the ordinary course exception is certainly not the "majority rule." On the contrary, it has never been recognized.

Petitioners' per se express notice rule cannot be correct — it would invalidate police taping systems around the country. The taping of 7799, at least according to respondents' version of the facts, which the jury credited, is precisely the type of taping that the ordinary course exception

contemplated. The court in *Jandak v. Village of Brookfield*, 520 F. Supp. 815 (N.D. Ill. 1981), discussing a taping system identical to the system used to tape 7799, observed the following:

> Police departments commonly have recording systems like that of defendants, due to the need to preserve and be capable of accurately recalling messages pertaining to emergencies or to official police business. To further these purposes, defendants engaged a communications common carrier to install a recording system, to record emergency and investigative calls, as an integral component of the communications system used by the police department in performing its duties to the public. Such a system indiscriminately and routinely records all activities on established designated lines, and is not comparable to the selective use of recording equipment to eavesdrop on a normally unmonitored telephone system in order to record specifically selected communications. There is little doubt that Congress did not intend the statute to apply to routine recording of emergency and investigative calls as an integral component of a police station telephone system like that of defendants.

520 F. Supp. at 822. How could these standard police taping systems operate if express notice to every caller were required? Are all taped police lines required to have audible beep tones? Even then, beeping a telephone line does not necessarily put a party on notice that the line is taped. *See e.g.*, *PBA Local No. 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808 (D. N.J. 1993). Evidence was presented at the

trial that beeping a police line can interfere with transmissions, and there are legitimate police business needs for unbeeped, taped police lines. If the only way to comply with the exception were to beep lines, it would be expected that Congress, in enacting a comprehensive regulatory scheme, would have said so. It would have been easy enough to require a beep tone, rather than the ordinary course of business, for the exception to apply.

Of course, the *Jandak* court discussed a need for notice, but not the express notice petitioners argue they should have received. The court in *Jandak* concluded that because some employees knew the line was taped, the plaintiff, the secret paramour of a police officer, should have known. If *Jandak's* concept of notice is what the statute requires, it was satisfied here. But in *Jandak*, notice was inferred because of the routine, indiscriminate taping of the line.

The petition attempts to alarm the Court about the dangers of a "premises-based" exception to the Wiretap Act created by the Seventh Circuit's opinion. The Seventh Circuit's opinion, however, in no way announces any type of a "premises-based" approach. The opinion focuses on the proper standard to be applied under the exception, whether the taping was "ordinary," for the purposes Congress contemplated in carving out the exception, in that it was done routinely, without being targeted at a particular individual or investigation, or done to intimidate the users of the line. Under the Seventh Circuit's analysis, if the evidence warranted a conclusion that the taping of a telephone line on police premises was done under circumstances that were not "ordinary," then the exception would be inapplicable.

Finally, petitioners complain that the privacy interests of the Wiretap Act suffer under the Seventh Circuit's analysis. As the Seventh Circuit properly pointed out, however, although privacy is a major the concern of the Wiretap Act, it is not the only concern. The Wiretap Act is a broad based regulation. Under the statute's one party consent exception (18 U.S.C. § 2511(2)(c)), the privacy interests of the non-consenting party become subordinate to the statute's broader regulatory purpose. The same is true of the law enforcement exception. Moreover, no privacy should have been expected on 7799, as the jury's conclusion that there was no Fourth Amendment violation demonstrates. Petitioners' had no privacy interest on this line, since its designated purpose, though maybe not in petitioners' view, was not for privacy, but for police business, and the taping was done openly, rather than secretly.

Petitioners also complain that the Seventh Circuit's emphasis on the routine nature of the taping triggering the exception is inconsistent with this Court's opinion in *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820 (1974) ("The Supreme Court has held that wiretapping should not be a routine procedure." Petition at 12). In *Giordano*, this Court observed that an attempt to obtain judicial authorization of a wiretap should be "used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation." 416 U.S. at 515. There is no inconsistency between the Seventh Circuit's opinion here and the court's observation in *Giordano*. The routineness emphasized by the Seventh Circuit is what establishes the non-investigative nature of the taping, that is, taping done indiscriminately, under circumstances not designed to target

a particular individual, communication, or investigation. In *Giordano*, the court was concerned about tapings in criminal investigations, under circumstances where law enforcement officers routinely seek judicial authorization to engage in wiretapping without establishing in the application for the authorization that other investigative procedures were insufficient. Again, the crucial distinction is that the taping here occurred in an administrative, non-investigative setting, while in *Giordano* the purpose of the taping was to obtain evidence against targeted individuals. The jury rejected petitioners' assertion that the latter situation existed here, and under respondents' version of the facts, the Seventh Circuit's finding that the ordinary course exception applied was proper. As a result, the Writ should be denied.

II. THE WRIT SHOULD BE DENIED ON THE QUESTION OF WHETHER A MUNICIPALITY CAN BE HELD LIABLE UNDER § 2511(1)(a) OF THE WIRETAP ACT, BECAUSE THE SEVENTH CIRCUIT'S ONE LINE OBSERVATION THAT MUNICIPALITIES ARE NOT LIABLE UNDER THE WIRETAP ACT WAS DICTUM, AND NOT SUBJECT TO REVIEW IN THIS COURT, AND IN ANY EVENT A CORRECT INTERPRETATION OF THE STATUTE NOT IN CONFLICT WITH OTHER CIRCUITS.

A. The Court's Observation Was Mere Dicta

The district court found that respondent Woodstock, an Illinois municipality, could not be held liable under § 2511(1) of the Wiretap Act, because it was not a "person" under that provision. Therefore, the district court dismissed Woodstock prior to the case going to the jury. The jury then returned a verdict in favor of the remaining respondents, finding no

violation of the Wiretap Act. On appeal, the Seventh Circuit affirmed the district court's judgment that there was no violation of the Wiretap Act. In doing so, the Seventh Circuit observed that "[t]he plaintiffs also complain about the dismissal of the City of Woodstock as a defendant, which was, however, proper, because Title III does not allow for suits against municipalities. 18 U.S.C. § 2510(6)." (App. at 7a) Petitioners challenge this conclusion, but their argument is aborted from any practical effect. The verdict, judgment and appellate decision were all in favor of respondents. There was no violation of the Wiretap Act. Therefore, whether a municipality could be found liable under the Wiretap Act is of no moment. The court does not review abstract issues disconnected from the facts below. *California v. Rooney*, 483 U.S. 307, 107 S .Ct. 2852 (1987), *reh'g den.*, 108 S. Ct. 30 (1987); *Atchison, Topeka & Santa Fe R.R. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410 (1987). Without a finding that a Wiretap Act violation occurred, whether Woodstock could be liable for a violation is unreviewable. Therefore, the Writ should be denied.

B. In Any Event, The Seventh Circuit Was Correct In Concluding That Municipalities Are Not Liable Under § 2511(1) Of The Wiretap Act, And The Decision Is Not In Conflict With Other Circuit Decisions

Section 2511(1) of the Wiretap Act states that any "person" who engages in the acts prohibited under the statute is subject to criminal and civil responsibility under the Act. 18 U.S.C. § 2511(1). "Person" is defined in § 2510(6) of the Act as "[a]ny employee, or agent of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation." 18 U.S.C. § 2510(6).

Section 2520 of the Act provides a remedy for violations of various provisions of the statute. In 1986, the Wiretap Act was extensively amended. Section 2511(1) of the Act was amended to require that an intentional, rather than a wilful, state of mind would violate the Act. In addition, § 2511(3)(a) added a provision for various disclosures by providers of electronic communications services to the public. That provision was amended to prohibit such disclosures by "any person or entity. . . ." Section 2520 of the Act was also amended to allow for civil damages against any "person or entity" found in violation of any of the substantive provisions of the statute. There was no amendment to § 2511(1) to include "person or entity" within the class potentially liable for violating the Act, and the definition of "person" under § 2510(6) was also unchanged.

Petitioners argued in the district court that respondent Woodstock, as a municipality, could be held responsible for violations of the Wiretap Act by its agents, notwithstanding that the definition of "person" under § 2511(1) excluded governmental agencies. Petitioners argued that the amendment to § 2520(a) as a result of the 1986 amendments, adding the term "entity" to the remedy provision of the Act, indicated an intent to include municipalities within the § 2511(1) prohibition. The district court rejected the argument, concluding that the amendment to § 2520(a) was meant to encompass those substantive provisions of the statute in which entities could be found responsible for violations of the Wiretap Act. The court concluded that because § 2511(1) was not amended to prohibit the actions of entities, but remained applicable only to "persons," and the definition of "persons" was not changed to include governmental agencies, that Woodstock could not be held responsible under the Act.

The Seventh Circuit agreed with that conclusion. Petitioners now seek review of that conclusion, arguing that it was incorrect and inconsistent with other circuit decisions. However, the Seventh Circuit's conclusion was neither incorrect nor inconsistent with other circuit court decisions. It is true that three district court opinions agreed with petitioners' interpretation of the statute. However, all three of these decisions suffered from the same error into which petitioners' attempted to draw the Seventh Circuit. The three opinions focused on § 2520, concentrating on its language in isolation. Neither petitioners nor any of the cited district court cases considered that § 2520 was only the remedial tail following upon the violation of the substantive provision, § 2511(1), which imposed the duty to refrain.

One cannot sue for a violation of § 2520. The suit must be founded on a violation of a substantive provision of the statute. The civil damages part of the Wiretap Act is a tort statute. *Awbrey v. Great Atlantic Tea Co., Inc.*, 505 F. Supp. 604 (N.D. Ga. 1980). As with any tort, a defendant can only be liable for breaching a duty that was imposed upon it.

Petitioners based their claims here on § 2511(1). If they could recover at all against respondent Woodstock, it had to be on that basis. That provision, however, applied only to "persons," and Congress carefully defined "person" as "any employee or agent of the United States or any state or political subdivision thereof," but deliberately left the employing entities themselves out of the definition. In commenting on its definition of "person," Congress noted the definition's applicability to the entire chapter, and stated "[t]he definition explicitly includes any officer or employee of the United States or any State or political subdivision of a State. . . . Only the governmental units themselves are

excluded. . . . Otherwise, the definition is intended to be comprehensive." S. Rep. No. 1097, 90 F. Cong. 2d Sess. (1968), *reprinted in* U.S.C.C.A.N. 2112, 2179.

Taking the language of the Act as its guide, the substantive provision of the statute must be analyzed first. Between the word "person" and the word "entity," only the word "person" was specifically defined by Congress, and appears in § 2511(1). Congress added "entity" to the remedy provision as a result of its 1986 amendments, but Congress also added other provisions which did impose liability upon governmental entities. Nevertheless, it did not change the language of § 2511 to impose that section's restrictions on "entities." The district court's own language explained this reasoning best.

> There was no provision comparable to § 2511(3)(a) in the original statute. *See* 18 U.S.C. § 2511. No other provision of § 2511 contains the "person or entity" language. Nevertheless, to maintain consistency with the alternative language contained in § 2511(3)(a), it would have been necessary for Congress to have placed similar language in the remedial provisions of § 2520, which it did. Thus, there exist a reasonable explanation for the addition of the word "entity" in § 2520 which is short of a Congressional intent to amend the statute to include local governmental entities as potential defendants. Furthermore, in view of this likely explanation for the inclusion of the term "entity," it cannot properly be considered superfluous.

(App. at 33a).

This Court has often urged a holistic approach to statutory interpretation. *International Primate Protection League v. Administrators of Tulane Education Fund*, 500 U.S. 72, 79, 111 S. Ct. 1700, 1705 (1991) ("We continue to recognize that context is important in the quest for [a] word's meaning," (Citation omitted), and that "statutory construction. . . . is a holistic endeavor.") *Accord*, *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 24 (2nd Cir. 1989) ("In ascertaining the proper construction of a specific statutory provision, it is also appropriate and helpful to view the disputed language in context; that is, to interpret the specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part.") The conclusion of the district court, upheld by the Seventh Circuit, conforms to the holistic approach. It also heeds this Court's admonition that "where Congress includes particular language in one section of a statute, but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983).

Other than the three district court cases which make the same mistake petitioners attempt to perpetrate here, no other appellate level case agrees with petitioners' argument. It is conflicts between the circuit courts that concern this Court (Sup. Ct. R. 10), and no such conflict exists. Petitioners cited to two other circuit court cases, but they do not support petitioners' argument. The Seventh Circuit's opinion in *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998), affirmed a grant of summary judgment in favor of the defendant City of Evansville under the Wiretap Act. In doing so, the court did not consider, analyze or decide the issue at bar. *Davis*

specifically found that "the City of Evansville did not itself engage in a violation of the Federal Wiretap Act." *Id.* at 620. However, whether the City of Evansville was a "person" under the Act was never argued or decided. No case stands as precedent for a matter that it did not analyze and decide. *In Re Stegall*, 865 F.2d 140 (7th Cir. 1989); *United States v. Kucik*, 844 F.2d 493, 498 (7th Cir. 1988). *Davis* is not a precedent that is inconsistent with the Seventh Circuit's observation here.

The other appellate level case petitioners attempt to harness as support for their position is the Second Circuit's decision in *Organizacion J. D. Letda v. United States Department of Justice*, 18 F.3d 91 (2nd Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994). This case, however, cannot support petitioners' argument, because it found the Wiretap Act inapplicable. *Id.* at 94. *Organizacion* focused on a different chapter that was also added to the statute in 1986, 18 U.S.C. § 2701 *et seq.*, addressing electronically stored information. The holding in *Organizacion* is no more extensive than: "We . . . hold that governmental "entities" are subject to liability under § 2707(a)." *Id.* at 95. That provision, however, was never at issue here.

Viewed as a whole, the intention of Congress was not to impose liability directly on governmental entities, but only on persons as defined. If Congress had intended to cover governmental entities directly, it would have so stated, as it clearly did in the stored information provisions of 18 U.S.C. §§ 2701-2707. But if there were any doubt, § 2511 is a predicate, not only for civil damages, but also for penalties and imprisonment. It is a penal statute. *Western Casualty Surety Co. v. City of Palmyra*, 650 F. Supp. 981 (E.D. Missouri 1987); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa.

1979). Penal statutes are to be construed narrowly, with all doubts being resolved to the defendants' benefit. *United States v. Lam Kwong-Wah*, 924 F.2d 298, 305 (D.C. Cir. 1991). Both the district court and the Seventh Circuit were correct in concluding that a municipality is not a "person" under § 2511(1), and there is no appellate level case that disagrees with this conclusion.

CONCLUSION

As a result, the Writ should be denied.

Respectfully submitted,

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